

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL,  
INC. and SIERRA CLUB

Intervenors-Plaintiffs.

v.

DTE ENERGY COMPANY and  
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.  
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

**AGREEMENT REGARDING THE SCOPE OF EXPERT DISCOVERY**

This Expert Discovery Agreement ("Agreement") is entered into between Plaintiff, the United States of America; Defendants, DTE Energy Co. and Detroit Edison Co. (collectively "DTE"); and the Intervenors-Plaintiffs Natural Resources Defense Council, Inc. ("NRDC") and Sierra Club, the parties to this action (collectively "the Parties").<sup>1</sup>

This Agreement describes information regarding testifying experts that the Parties agree cannot be discovered. The purpose of this Agreement is to reduce the burden and uncertainty of expert discovery, without unduly affecting the Parties' ability to test the accuracy, reliability, or truth of any testimony, expert opinion, or evidence. This stated purpose shall be used to interpret any provisions in the event of a dispute.

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<sup>1</sup> This Agreement, unless and until modified, applies to the United States and DTE upon signature whether or not intervention is allowed.

Notwithstanding any provision in the Federal Rules of Civil Procedure to the contrary, the following terms apply to the production of documents under Rule 26(a)(2)(B), Rule 34, and Rule 45, and to the scope of expert deposition testimony:

1. Considered Data or Information.

- a. At the time of submission of the expert reports, the Parties will identify “the data or other information considered by the witness in forming his or her opinions,” in accordance with Fed. R. Civ. P. 26(a)(2). For the purpose of this Agreement, except as noted below, “considered documents” shall be those documents that have been received and read or reviewed, furnished to the expert to be used in forming opinions (other than those determined to be not relevant after a cursory review), or taken into account by the expert, regardless of whether the expert actually relies upon the document, in forming his or her opinion.
- b. Such “data or other information,” referenced in Subparagraph 1.a. above, may be the subject of questioning during expert depositions. The Party submitting expert reports will serve copies of all “considered” documents to the other Party at the time it submits the corresponding expert report(s). Where such “data or other information” was produced by any Party in this litigation (or to EPA administratively), identification by Bates number will be sufficient. The Party submitting expert reports shall identify documents that are publicly available, but is required to produce such documents only if it is more burdensome for the Party receiving the expert report to obtain them than it would be for the Party producing the expert report, and upon a specific request. Such production shall take place within ten business days of the request.

2. Expert Drafts. Notwithstanding Paragraph 1, all drafts and pre-final versions of an expert's report, affidavit, or declaration shall be outside the scope of expert discovery. "Drafts and pre-final versions" shall be interpreted to encompass only the following:
  - a. Drafts of the expert's report, affidavit, or declaration, as well as any draft or preliminary spreadsheets, tables, or other quantitative analyses, outlines, or notes, that were created by the expert (or for the expert by persons employed by or otherwise working for the expert) as part of preparing his/her report, affidavit, or declaration in this action; and
  - b. Drafts and pre-final versions exchanged between the expert (or persons employed by or otherwise working for the expert) and another testifying expert. However, if one testifying expert ("Expert A") relies on a document authored by another testifying expert ("Expert B"), the version of the document relied on is subject to discovery (from Expert A), notwithstanding its status as a "draft" of the authoring expert (Expert B), unless all information considered by Expert A is contained in Expert B's final report, affidavit, or declaration.
3. Communications Regarding Expert Drafts. Notwithstanding Paragraph 1, the substance of comments (both written and verbal) about drafts and pre-final versions (as defined in Paragraph 2) of expert reports, affidavits, or declarations, between counsel and the expert shall be outside the scope of expert discovery.
4. Other Communications Regarding Expert Report/Expert Engagement. Non-substantive communications (including electronic mail) between the expert (or persons employed by or otherwise working for the expert) and the Party or any other representative thereof (including counsel) shall be outside the scope of expert discovery.

5. Documents or Information Relating to Expert Work in Other Utility Initiative Cases

- a. To the extent documents or other information (a) relate to work performed in one of the other Clean Air Act New Source Review cases filed on or after November 2, 1999, and (b) were created by either: (i) a testifying expert designated in the instant civil action or (ii) a testifying expert designated in any of the other Clean Air Act New Source Review cases filed on or after November 2, 1999, such documents or other information are outside the scope of expert discovery, unless such documents fall into the category described in Paragraph 1 and are not outside the scope of expert discovery under Paragraphs 2, 3, or 4.
- b. Notwithstanding Subparagraph 5.a, final expert reports and related exhibits, depositions and related exhibits, declarations, affidavits, trial testimony and related exhibits generated by a testifying expert, irrespective of the action in connection with which it was created, shall be discoverable subject to claims of confidential business information.

6. Expert Depositions. With regard to depositions of experts designated by a Party:

- a. Each Party will pay for the time that Party's own expert spends in deposition; and
- b. The seven-hour, one-day limit imposed by Rule 30(d)(1) shall apply to expert depositions, except as otherwise set forth in this Subparagraph. If a Party anticipates either before or during a deposition of an expert that an expert's deposition will take longer than seven hours, the Parties shall discuss the need for an extension. If the Parties cannot reach agreement regarding an extension, the Party taking the deposition may seek relief from the Court and bears the burden of demonstrating that seven hours is inadequate. Any depositions taken before the

preliminary injunction hearing in this case shall be in addition to the time allowed by this Subparagraph and Rule 30(d)(1); provided, however, that the Parties shall confer regarding whether less than seven hours is needed to depose an expert whose opinions are substantially identical to those offered during the preliminary injunction proceeding. If the Parties cannot reach agreement on the length of the second deposition, the deposing Party may seek relief from the Court and bears the burden of demonstrating that a time period of less than seven hours is adequate based on the similarity of the opinions offered at the preliminary injunction hearing and the ultimate merits trial.

7. Inadvertent Disclosure. To the extent that any Party obtains through inadvertent disclosure any information, documents, or communications other than final expert reports and related exhibits, depositions and related exhibits, declarations, affidavits, trial testimony and related exhibits that are described herein as outside the scope of expert discovery, such information, documents and communications shall not be filed or presented for admission into evidence or sought in discovery by that Party in this action or any other litigation.
8. Illustrative Examples. The following examples are intended as a guide for interpreting the scope of expert discovery permissible under the terms of this Agreement:
  - a. A testifying expert considers or relies upon data supplied by counsel or by a non-testifying consultant. The Party deposing the testifying expert may ask questions about the data supplied by counsel or the non-testifying consultant.
  - b. A testifying expert discusses the organization of his expert report with counsel. These communications with counsel need not be disclosed.

SO STIPULATED

*For Defendants*

/s/ Mark B. Bierbower

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2010, the foregoing Agreement was served on all counsel of record via the Court's ECF system.

/s/ Mark B. Bierbower

Mark B. Bierbower